SILAND SDN. BHD. & ANOR.

v.

M & J FROZEN FOOD SDN. BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
RICHARD TALALLA JC
[CIVIL SUIT NO. 22-980 OF 1987]
25 FEBRUARY 1990

LAND LAW: *Land charged as security - Default - Auction - Sale to be under supervision of Court - Sections 256 to 259 of the National Land Code - Special conditions of sale - Johore Conditions - Application for extension of time to pay balance purchase price - Whether written notice given - Extension allowed - Setting aside order - Effect of - Section 266(1) National Land Code.*

The first plaintiff was at all material times the owner of a piece of land. The first plaintiff charged the said land to the second defendant as security for a loan granted by the second defendant. The first plaintiff defaulted under the terms of the charge whereupon there accrued a right to have the land sold and the loan realised out of the proceeds of sale.

As the land was held under registry titled subsection (2) of s. 257(1) of the National Land Code enabled the Court to include in the order for sale such other directions as the Court may think fit. Certain general conditions of sale were set out. These general conditions were known as the Johor conditions of sale. These conditions provided that in case of conflict or repugnancy between those conditions and any special conditions imposed on any sale, the special conditions should prevail; and the Johor Conditions shall be deemed to be modified so far only as is necessary to give full effect to such special conditions.

During the public auction, the first defendant M & J Frozen Foods Sdn. Bhd., was the successful bidder. In accordance with the special conditions, the first defendant paid a deposit of 25% of the purchase price and contracted to pay the balance within 30 days of the date of sale, 25 January 1987.

Frozen Food failed to do so. The special conditions did not provide for the consequence of such failure, nor did the memorandum of contract. Therefore recourse had to be made to the Johore Conditions of Sale.

On 15 July 1987, the first defendant purchaser sought an order for an extension of time to pay the balance purchase price and thus waived the right to have the ten days notice, as required by the Johore conditions of sale. The order was granted. The first plaintiff was not made a party to the proceedings.

On learning of the order, the first defendant applied on 8 October 1987 applied to intervene in these proceedings. The application was allowed and the order of 15 July 1987, allowing extension was set aside.

Notwithstanding the setting aside of the order, the first plaintiff paid the balance of the purchase price to the SAR. On 29 September 1988, the SAR issued a certificate of sale and the land was transferred and registered in the name of Frozen Food.

The first plaintiff now seeks a declaration that the sale be rescinded.

Held:

[1] The extension of time was granted without reference to the chargor. It was granted in abrogation of the chargor's rights, thus rendering the chargor open to liability to pay additional interest on the loan to wit interest for the extended period allowed for completion of the sale.

[2] The extension of time gave preference to the buyer who had defaulted under the contract.

[3] The first defendant, Frozen Food, should have its deposit forfeited and the property should be resold.

[4] The Court makes the following orders to the order setting aside the order for extension of time.

[Order accordingly]

Legislation referred to:
National Land Code 1965, ss. 256, 257(1),(2), 258(1)(a), 259, 266(1)

For the plaintiff - N. Jegatheeson with him Gunasegaran; M/s. Guna & Co.
For the Frozen Food Sdn. Bhd. - Arthur Lee & S.C. Yap; M/s. Arthur Lee, Yap & Netto
For the EU Finance - Sophia Chew; M/s. K.C. Yap Kamaludin & Partners

JUDGMENT

Richard Talalla JC:

In this action the 1st plaintiff Siland Sdn. Bhd. (Siland) was at all material times the owner of a piece of land in the Mukim of Plentong in the District of Johor Bahru (the land). Siland charged the land to the 2nd defendant Eu Finance Bhd. (Eu Finance) as security for a loan granted by Eu Finance to Siland. Siland defaulted under the terms of the charge whereupon there accrued to Eu Finance a right to have the land sold and the loan realised out of the proceeds of sale.

It is trite that when a lender wishes to sell the land of a borrower in order to recover a debt, as in the present case, the lender cannot sell the land as and how the lender pleases. The law requires the sale of the land to be under the supervision of the Court. This is in order to ensure that the sale is carried out in justice and fairness to all persons concerned which persons include not only the chargee but also the chargor.

The procedure for the exercise by the Court of its supervisory powers over the sale of land held under the registry title, as the land in this case was, is contained in s. 256 to 259 of the Code. Section 256 provides for an order for sale of land to be made on application by the chargee. Under s. 257(1) the order for sale shall provide for the sale to be by the public auction. Subsection (2) of that section enables the Court to include in the order for sale such other directions with respect to the sale as the Court may think fit.

In order to facilitate the imposition by the Court of the terms and conditions of sale certain general conditions of sale were set out. These general conditions are known as the Johor conditions of sale. They provide *inter alia* that in case of conflict or repugnancy between those conditions and any special conditions imposed on any sale, the special conditions shall prevail; and the Johor Conditions shall be deemed to be modified so far only as is necessary to give full effect to such special condition. See Clause 23.

In originating summons No. 180 of 1985 Eu Finance applied to this Court for an order for sale of the land. Siland entered an appearance to the summons. Pursuant thereto an order for sale of the land was made and the 2nd plaintiff Mohd. Kepol bin Bidin (Kepol), now deceased, a licensed auctioneer was appointed by the Court to carry out the sale.

The sale was by public auction and conducted subject to a proclamation of sale and certain special conditions of sale (special conditions) both of which were printed and duly published. The 1st defendant M & J Frozen Food Sdn. Bhd. (Frozen Food) was the successful bidder at the auction and duly pronounced the purchaser at a price of RM196,000. In accordance with Clause 6 of the special conditions Frozen Food paid a deposit of 25% of the purchase price and a memorandum of contract was executed between Kepol and Frozen Food. Under Clause 7 of the special conditions Frozen Food was obliged to pay the balance of the purchase money into Court to the credit of the proceedings within 30 days of the date of sale, the date of sale being 25 January 1987, and in this respect time was of the essence of the contract. Frozen Food failed to do so.

The special conditions did not provide for the consequence of such failure, nor did the memorandum of contract. Therefore recourse had to be had to the Johor conditions of sale which were expressly stated to apply. There it is stated, see Clause 19, that if the purchaser shall fail to comply with these or the special conditions or the Contract the vendor shall be at liberty (after ten days' written notice to the purchaser or his solicitor) to treat the deposit as forfeited, and, without tendering an assurance, to resell the property. It is not known whether such written notice was given to Frozen Food.

The record in originating summons 180 of 1985 disclose that a letter dated 18 February 1987 was written to our Senior Assistant Registrar wherein an extension of 2 months from 25 February 1987 to pay the balance of the purchase price was sought. This letter was followed by another dated 8 May 1987 seeking a further extension of 1 month from 25 April 1987 in which to pay the balance. There appears to have been no answer to either letter.

On 15 July 1987 Frozen Food applied to this Court by originating summons No. 31-731 of 1987 whereunder it sought an order for an extension of time to pay the balance price. Thus they waived the right to have the ten days' written notice, assuming such notice was not given. The respondents in the originating summons were Eu Finance. The order for extension of time was made the same day. Siland was not made a party to the proceedings. However Siland obviously had wind of it and on 8 October 1987 claiming to be an interested and aggrieved party applied to intervene in the proceedings. The application was allowed and it was further ordered that the order of 15 July 1987 extending time be set aside.

Notwithstanding the setting aside of the order of 15 July Frozen Food paid the balance of the purchase price of RM147,000 to the Senior Assistant Registrar. This payment was incidentally 1 year after the expiry of the period stipulated in the special conditions for the payment of the balance of the purchase price.

On 29 September 1988 the learned Senior Assistant Registrar issued a certificate of sale and the land was transferred and registered in the name of Frozen Food.

Siland now seeks relief to the end that it be declared that Frozen Food are not entitled to an extension of time to pay the balance purchase price, the deposit of RM49,000 be forfeited in their favour, the purported sale of the land to Frozen Food be rescinded, the certificate of sale be annulled, the registration of Frozen Food's title to the land be cancelled, the issue document of title be returned to our Registrar and the property be put up for sale by the Court once again.

It is submitted on behalf of Frozen Food that the moment the hammer was struck at the auction, the sale was complete and Siland's right to the land vanished and all Siland was entitled to thereafter was the residue, if any, of the money realised on the sale of the land. The decision of V.C. George J in Johor Bahru High Court originating summons No. 31-745 of 1985 *Malayan United Finance Berhad v. Liew Yet Lan (f) & Boo Choon Sia* was relied on for support of the argument. A reading of that decision, with which I respectfully agree, does not appear to support Frozen Food's case at all. There his Lordship laid down that a defaulting chargor abdicates his right as registered owner of the land vis-a-vis selling it, in favour of the chargee. That is, to my mind, a far cry from saying that a chargor's right to the land, the right to residue of the balance purchase price excepted, vanishes as soon as the auctioneer brings down his hammer.

It seems to me that notwithstanding the order for sale the chargor has rights in respect of the land which continue until the sale is concluded. Pursuant to s. 266(1) of the National Land Code he may at all time before the conclusion of the sale pay up all monies due under the charge and all expenses incurred in connection with the order for sale whereupon the order for sale shall cease to have effect. This may well be one of the reasons why the registrar of the Court is required to serve a copy of the order for sale on the chargor. See s. 258(1)(a) of the Code. After all it is the chargor's land. It is therefore only right and in accordance with common sense that if he pays the debt in full together with all expenses before the concluded sale, the order for sale should cease to have effect and the chargor have back his land.

Nowhere in the order for sale, the Johor conditions of sale, the special condition or the memorandum of contract was there anything empowering the Court, on the application of buyer of the land, to extend time for payment of the balance purchase price; it is quite the contrary. V.C. George J found so in the Malayan United Finance case abovestated and likewise possibly did the learned Judge who set aside the order extending time.

The extension of time was granted without reference to the chargor. It was granted in abrogation of the chargor's rights thus rendering the chargor open to liability to pay additional interest on the loan to wit interest for the extended period allowed for completion of the sale. What is more the extended time gave preference to the buyer who had defaulted under the contract and who by virtue of that default and the terms of the contract should, subject to the ten days' notice, have had his deposit forfeited whereafter the property should have been resold. Frozen Food obtained this without notice to Siland. It was soon put right when Siland intervened and put forward their case.

That being the case it does not fall to me to declare that Frozen Food is not entitled to the extension of time. That is so much water as has passed beneath the bridge. As I see it, I must now make orders consequential to the order setting aside the order for extension of time. There is no appeal against that order.

Eu Finance had taken the same stand and supported Frozen Food.

I accordingly adjudge as follows:

(a) the deposit of RM49,000 be forfeited in favour of Siland.

(b) the learned Senior Assistant Registrar's certificate of sale be annulled.

(c) The registration of the title to the land in the name of Frozen Food be cancelled and the issue document of title thereto be returned to the Senior Assistant Registrar.

(d) the land be resold.

(e) there be liberty to apply.

(f) the defendants do pay the first plaintiff's costs of the action to be taxed.

Also found at [1990] 1 CLJ 1227